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Chapter V
Identification of customary international law

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A. Introduction

1. At its sixty-fourth session (2012), the Commission decided to include the topic "Formation and evidence of customary international law" in its programme of work and appointed Sir Michael Wood as Special Rapporteur.[1] In paragraph 7 of its resolution 67/92 of 14 December 2012, the General Assembly noted with appreciation the decision of the Commission to include the topic in its programme of work. At its sixty-fifth session (2013), the Commission decided to change the title of the topic to "Identification of customary international law".[2]

2. From its sixty-fifth (2013) to sixty-eighth sessions (2016), the Commission considered four reports by the Special Rapporteur,[3] as well as two memorandums by the Secretariat.[4]

3. At its sixty-eighth session (2016), the Commission adopted, on first reading, a set of 16 draft conclusions on identification of customary international law, together with commentaries thereto.[5] It decided, in accordance with articles 16 to 21 of its statute, to transmit the draft conclusions, through the Secretary-General, to Governments for comments and observations.[6]

B. Consideration of the topic at the present session

4. At the present session, the Commission had before it the fifth report of the Special Rapporteur (A/CN.4/717), an addendum to that report (A/CN.4/717/Add.1) providing an updated bibliography on the topic, as well as comments and observations received from Governments (A/CN.4/716). The Commission also had before it a memorandum by the Secretariat on ways and means for making the evidence of customary international law more readily available (A/CN.4/710).

5. The Commission considered the fifth report of the Special Rapporteur at its 3396th to 3402nd meetings from 7 to 14 May 2018. At its 3402nd meeting, held on 14 May 2018, the Commission referred draft conclusions 1 to 16 to the Drafting Committee, with the instruction that the Drafting Committee commence the second reading of the draft conclusions on the basis of the proposals of the Special Rapporteur, taking into account the comments and observations of Governments and the debate in the plenary on the Special Rapporteur's report.

6. The Commission considered the report of the Drafting Committee (A/CN.4/L.908) at its 3412th meeting, held on 25 May 2018, and adopted the entire set of draft conclusions on identification of customary international law on second reading (sect. E.1 below).

7. At its 3402nd meeting, on 14 May 2018, the Commission decided to establish a working group, to be chaired by Mr. Marcelo Vázquez-Bermúdez, to assist the Special Rapporteur in the preparation of the draft commentaries to the draft conclusions to be

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[1] At its 3132nd meeting, on 22 May 2012 (*Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 10* (A/67/10), para. 157). The Commission had before it a note by the Special Rapporteur (A/CN.4/653). The topic had been included in the long-term programme of work of the Commission during its sixty-third session (2011), on the basis of the proposal contained in annex A to the report of the Commission (*ibid., Sixty-sixth Session, Supplement No. 10* (A/66/10), pp. 305–314). In its resolution 66/98 of 9 December 2011, the General Assembly took note of the inclusion of the topic in the long-term programme of work of the Commission.

[2] *Ibid., Sixty-eighth Session, Supplement No. 10* (A/68/10), para. 65.

[3] See A/CN.4/663 (first report), A/CN.4/672 (second report), A/CN.4/682 (third report), A/CN.4/695 and A/CN.4/695/Add.1 (fourth report and addendum thereto).

[4] See A/CN.4/659 (memorandum by the Secretariat) and A/CN.4/691 (memorandum by the Secretariat).

[5] *Official Records of the General Assembly, Seventy-first session, Supplement No. 10* (A/71/10), paras. 57 and 59.

[6] *Ibid.*, para. 60.

adopted by the Commission. The working group held … meetings between … and … May 2018.

8. At its … to … meetings, from … to … 2018, the Commission adopted the commentaries to the aforementioned draft conclusions (sect. E.2 below).

9. At its … meeting, held on … 2018, the Commission requested that the memorandum by the Secretariat on ways and means for making the evidence of customary international law more readily available (A/CN.4/710) be reissued to reflect the text of the draft conclusions and commentaries adopted on second reading.

10. In accordance with its statute, the Commission submits the draft conclusions to the General Assembly, together with the recommendation set out below.

C. Recommendation of the Commission

11. …

D. Tribute to the Special Rapporteur

12. At its … meeting, held on … 2018, the Commission, after adopting the draft conclusions on identification of customary international law, adopted the following resolution by acclamation:

"*The International Law Commission*,

"*Having adopted* the draft conclusions on identification of customary international law,

"*Expresses* to the Special Rapporteur, Sir Michael Wood, its deep appreciation and warm congratulations for the outstanding contribution he has made to the preparation of the draft conclusions through his tireless efforts and devoted work, and for the results achieved in the elaboration of the draft conclusions on identification of customary international law."

E. Text of the draft conclusions on identification of customary international law

1. Text of the draft conclusions

13. The text of the draft conclusions adopted by the Commission, on second reading, at its seventieth session is reproduced below.

Identification of customary international law

Part One
Introduction

Conclusion 1
Scope

The present draft conclusions concern the way in which the existence and content of rules of customary international law are to be determined.

Part Two
Basic approach

Conclusion 2
Two constituent elements

To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*).

Conclusion 3
Assessment of evidence for the two constituent elements

1. In assessing evidence for the purpose of ascertaining whether there is a general practice and whether that practice is accepted as law (*opinio juris*), regard must be had to the overall context, the nature of the rule, and the particular circumstances in which the evidence in question is to be found.

2. Each of the two constituent elements is to be separately ascertained. This requires an assessment of evidence for each element.

Part Three
A general practice

Conclusion 4
Requirement of practice

1. The requirement of a general practice, as a constituent element of customary international law, refers primarily to the practice of States that contributes to the formation, or expression, of rules of customary international law.

2. In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law.

3. Conduct of other actors is not practice that contributes to the formation, or expression, of rules of customary international law, but may be relevant when assessing the practice referred to in paragraphs 1 and 2.

Conclusion 5
Conduct of the State as State practice

State practice consists of conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions.

Conclusion 6
Forms of practice

1. Practice may take a wide range of forms. It includes both physical and verbal acts. It may, under certain circumstances, include inaction.

2. Forms of State practice include, but are not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct "on the ground"; legislative and administrative acts; and decisions of national courts.

3. There is no predetermined hierarchy among the various forms of practice.

Conclusion 7
Assessing a State's practice

1. Account is to be taken of all available practice of a particular State, which is to be assessed as a whole.

2. Where the practice of a particular State varies, the weight to be given to that practice may, depending on the circumstances, be reduced.

Conclusion 8
The practice must be general

1. The relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent.

2. Provided that the practice is general, no particular duration is required.

Part Four
Accepted as law (*opinio juris*)

Conclusion 9
Requirement of acceptance as law (*opinio juris*)

1. The requirement, as a constituent element of customary international law, that the general practice be accepted as law (*opinio juris*) means that the practice in question must be undertaken with a sense of legal right or obligation.

2. A general practice that is accepted as law (*opinio juris*) is to be distinguished from mere usage or habit.

Conclusion 10
Forms of evidence of acceptance as law (*opinio juris*)

1. Evidence of acceptance as law (*opinio juris*) may take a wide range of forms.

2. Forms of evidence of acceptance as law (*opinio juris*) include, but are not limited to: public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference.

3. Failure to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*), provided that States were in a position to react and the circumstances called for some reaction.

Part Five
Significance of certain materials for the identification of customary international law

Conclusion 11
Treaties

1. A rule set forth in a treaty may reflect a rule of customary international law if it is established that the treaty rule:

(*a*) codified a rule of customary international law existing at the time when the treaty was concluded;

(*b*) has led to the crystallization of a rule of customary international law that had started to emerge prior to the conclusion of the treaty; or

(*c*) has given rise to a general practice that is accepted as law (*opinio juris*), thus generating a new rule of customary international law.

2. The fact that a rule is set forth in a number of treaties may, but does not necessarily, indicate that the treaty rule reflects a rule of customary international law.

Conclusion 12
Resolutions of international organizations and intergovernmental conferences

1. A resolution adopted by an international organization or at an intergovernmental conference cannot, of itself, create a rule of customary international law.

2. A resolution adopted by an international organization or at an intergovernmental conference may provide evidence for determining the existence and content of a rule of customary international law, or contribute to its development.

3. A provision in a resolution adopted by an international organization or at an intergovernmental conference may reflect a rule of customary international law if it is established that the provision corresponds to a general practice that is accepted as law (*opinio juris*).

Conclusion 13
Decisions of courts and tribunals

1. Decisions of international courts and tribunals, in particular of the International Court of Justice, concerning the existence and content of rules of customary international law are a subsidiary means for the determination of such rules.

2. Regard may be had, as appropriate, to decisions of national courts concerning the existence and content of rules of customary international law, as a subsidiary means for the determination of such rules.

Conclusion 14
Teachings

Teachings of the most highly qualified publicists of the various nations may serve as a subsidiary means for the determination of rules of customary international law.

Part Six
Persistent objector

Conclusion 15
Persistent objector

1. Where a State has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection.

2. The objection must be clearly expressed, made known to other States, and maintained persistently.

3. The present draft conclusion is without prejudice to any question concerning peremptory norms of general international law (*jus cogens*).

Part Seven
Particular customary international law

Conclusion 16
Particular customary international law

1. A rule of particular customary international law, whether regional, local or other, is a rule of customary international law that applies only among a limited number of States.

2. To determine the existence and content of a rule of particular customary international law, it is necessary to ascertain whether there is a general practice among the States concerned that is accepted by them as law (*opinio juris*) among themselves.